Supreme Court, U.S.
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Case No. 98-715

In The
SUPREME COURT OF THE UNITED STATES
October Term 1998

KENNETH J. WILSON

Petitioner

v.

LEWIS YAKLICH, MARY SANFORD, *et al.*
and the UNITED STATES OF AMERICA

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF THE OHIO RESPONDENTS IN OPPOSITION TO CERTIORARI

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STATEMENT OF THE CASE

This petition presents questions as to the extent of injury necessary to sustain a "failure to protect" claim under the Eighth Amendment to the United States Constitution and the applicability and constitutionality of 28 U.S.C. §1915(g), enacted as part of the Prison Litigation Reform Act ("PLRA"), Pub. No. 104-134, 110 Stat. 1321 (April 26, 1996).

The Petitioner is an inmate in the custody of the Ohio Department of Rehabilitation and Correction ("ODRC"). He had pursued more than 70 meritless civil cases and appeals in the federal courts at the time of the decision below. All of the Respondents, except the United States of America, are employees of ODRC. This petition arises out of the Sixth Circuit's consolidated disposition of two of the Petitioner's most recent federal appeals, the cases of *Wilson v. Yaklich*, Case No. 96-3023 (6th Cir.) and *Wilson v. Sanford*, Case No. 96-4323 (6th Cir.).

The *Yaklich* case was commenced in the district court by the Petitioner, *pro se*, prior to the enactment of the PLRA. It alleged, *inter alia*, that while he was incarcerated at the Mansfield Correctional Institution ("ManCI"), the Ohio Respondents were insufficiently sensitive to his fear of assault from other inmates and hence violated the Eighth Amendment. Most notably, it did not allege that he was ever assaulted or physically harmed by the inmates he feared. That complaint sought only damages and did not request injunctive relief. The district court reviewed the Petitioner's complaint, denied him permission to proceed *in forma pauperis* ("IFP") and dismissed his case without prejudice.

After the passage of the PLRA, the Petitioner appealed to the Sixth Circuit. The Respondents moved, pursuant to the newly enacted provisions of 28 U.S.C. §1915(g), to prohibit the Petitioner from pursuing the appeal

IFP. The Sixth Circuit appointed counsel for the Petitioner, and both the merits of his appeal and the applicability and constitutionality of §1915(g) were ably briefed by appointed counsel. His counsel argued, among other things, that §1915(g) could not be applied to his appeal because the case was originally commenced before its enactment and that the statute violates equal protection principles.

The *Sanford* case was commenced after the passage of the PLRA. It was the consolidated disposition of seven separate civil cases which the Petitioner sought to pursue IFP. Because of his long history of filing meritless cases, the district court invoked §1915(g) and denied IFP status. The Petitioner then filed a *pro se* appeal and incorporated by reference the arguments regarding §1915(g) made by his counsel in *Yaklich*.

The *Yaklich* and *Sanford* cases were consolidated for argument and the Petitioner's counsel in *Yaklich* argued on his behalf in both cases.

The Sixth Circuit issued a single opinion resolving both *Yaklich* and *Sanford*. It held that Petitioner's Eighth Amendment claims in *Yaklich* were properly found to be frivolous because he had not alleged any injury and hence the objective element of that claim. (A13-A17). It also held that the district court presiding over *Sanford* did not violate retroactivity principles in relying upon the Petitioner's pre-enactment dismissals to invoke §1915(g) because that statute is strictly procedural and does not significantly change his rights and duties. (A20-A22). It held that §1915(g) did not violate the Petitioner's right of access to the courts because he was still free to seek relief in state fora. In light of that decision, the Sixth Circuit further held that §1915(g) did abridge fundamental rights or rely upon suspect classifications and hence was subject to rational basis review for purposes of the Petitioner's Equal Protection challenge. The court found

that the need to deal with the onslaught of frivolous prisoner petitions provided a rational basis for the statute and hence upheld its constitutionality. (A22-A25).

REASONS FOR DENYING THE WRIT

Petitioner raises three clusters of issues. The first concerns the constitutionality of §1915(g) under Equal Protection principles. The second concerns the statute's retroactivity. The third concerns his underlying Eighth Amendment claim in *Yaklich*. All of those issues have either been conclusively resolved or are otherwise inappropriate for review.

I. The Petitioner's Equal Protection Issues Have Been Conclusively Resolved.

The Petitioner's first issue concerns the standard of review for restrictions that allegedly limit a prisoner's access to the courts. More specifically, he argues that his right to access the courts was "fundamental", that §1915(g) infringes upon that right and hence that §1915(g) should be subject to strict scrutiny. However, there are factual and legal problems with that issue.

Factually, the Sixth Circuit held that under Ohio law the Petitioner had full access to Ohio courts to assert the types of claims he raised in the district courts below. Hence, because there was no infringement, this issue is hypothetical.

Legally, three distinct lines of precedent have already determined the standard of review. As a general matter, this Court has repeatedly held that statutes requiring indigents to pay filing fees are subject to the rational basis review applied below when, as here, they do not interfere with cases concerning criminal or familial matters and do not preclude resort to alternate fora. *M.L.B. v. S.L.T.*, 519 U.S. 102

(1996); *United States v. Kras*, 409 U.S. 434 (1973); *Boddie v. Connecticut*, 401 U.S. 371 (1971). Drawing the matter into sharper focus, this Court has held the government need only "demonstrate a rational basis" to defeat a prisoner's equal protection attack on a challenged restriction. *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 134 (1977). Bringing the matter into the highest possible resolution, *Lewis v. Casey*, 518 U.S. 343 (1996), expressly held that restrictions on prisoners' ability to access the courts are reviewed under the rational basis test enunciated in *Turner v. Safley*, 482 U.S. 78 (1987). Hence this issue has been settled.

The second issue is in this cluster is whether §1915(g) violates equal protection principles because it does not address all types of frivolous litigation. However, it has been settled for more than half a century that a legislature does not violate equal protection guarantees because it only addresses a portion of the problems confronting it. *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). Once again, review is contraindicated because the issue has been conclusively resolved.

II. The Petitioner's Retroactivity Issues Are Increasingly Unworthy of Review.

The Petitioner's third issue is the propriety of considering pre-PLRA dismissals in the application of §1915(g) under the retroactivity principles established by *Landgraf v. USI Film Products*, 511 U.S. 244 (1994). There are two reasons why it does not merit review. First, the decision below is consistent with that of every other circuit to consider the issue and hence the conflict usually required to justify review of such a statutory question is not present. *Green v. Nottingham*, 90 F.3d 415, 419-420 (10th Cir. 1996); *Abdul-Wadood v. Nathan*, 91 F.3d 1023, 1025 (7th Cir. 1996); *Adepegba v. Hammons*, 103 F.3d 383, 385-386 (5th

Cir. 1996); *Keene v. Pennsylvania Bd. of Probation & Parole*, 128 F.3d 143, 144-145 (3rd Cir. 1997); *Tierney v. Kupers*, 128 F.3d 1310, 1311 (9th Cir. 1997). Second, this retroactivity issue has, and will, become increasingly irrelevant as time passes since the enactment of §1915(g).

III. The Petitioner's Eighth Amendment Issues Have Either Been Resolved by Subsequent Legislation or Were Not Raised Below.

The Petitioner's fourth issue, whether a prisoner may recover damages on an Eighth Amendment conditions of confinement claim based upon emotional/psychological injury unaccompanied by physical harm, has been resolved by the PLRA. That legislation enacted 42 U.S.C. §1997e(e), which provides that no recovery is possible in such a situation. Consequently, it is exceedingly unlikely that this issue will arise again.

The Petitioner's final issue concerns the availability of injunctive relief in connection with his Eighth Amendment claim. However, that issue is not properly before the Court because it was not raised below. Presumably because he had already been transferred form the *situs* of the perceived threat when he filed in the district court, Petitioner's complaint did not seek injunctive relief. Instead, he only sought damages. Since he did not seek injunctive relief at the outset of this case, the Petitioner cannot raise a constitutional claim on the matter at this late date.

CONCLUSION

The Ohio Respondents ask that this Court deny certiorari in these cases.

Respectfully submitted,

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